No. 1005

In the Supreme Court of the United States

OCTOBER TERM, 1956

HUGH BRYSON, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The principal opinion of the Court of Appeals (Pet. App. 29-44) is reported at 238 F. 2d 657. The Court of Appeals' opinion in connection with its denial of a petition for rehearing (Pet. App. 45-49) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1956 (Pet. App. 50). A petition for rehearing was denied on April 12, 1957 (Pet.

App. 45-49). On May 3, 1957, Mr. Justice Douglas entered an order extending the time for filing a petition for a writ of certiorari to June 7, 1957, and the petition was filed on June 6, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the term "affiliated," as used in § 9(h) of the National Labor Relations Act as amended, was unconstitutionally applied to petitioner's prosecution for filing a false affidavit of non-affiliation with the Communist Party, on the grounds that—

(*a*). the jury was not required to find that petitioner was affiliated with the Party, on the date of his affidavit, "for illegal purposes";

(*b*). petitioner's conviction was, allegedly, based in substance on nothing more than his activity in the Communist Party prior to the date of his affidavit;

(*c*). the word "affiliated" is too vague a term to warrant a conviction for false denial of affiliation; and

(*d*). it was "improbable" that petitioner made the post-affidavit admissions which the Government's witnesses attributed to him, and, further, that the admissions are said to lack the "corroboration" which they allegedly required.

2. Whether statements by another than petitioner, made in the course of a discussion in which petitioner also participated, were properly received in evidence for the purpose of showing the context in which

petitioner's statements were made and their meaning.

3. Whether the "two witnesses" perjury rule applies to a prosecution under the "false statements" statute for filing a false non-Communist affidavit.

4. Whether, in the circumstances of this case, the trial court abused its discretion in refusing to permit petitioner to communicate with the members of the jury, following their verdict, as to whether they understood the meaning of "affiliation" and how they arrived at their verdict.

STATUTES AND RULE INVOLVED

The pertinent provisions of 18 U.S.C. 1001 and of § 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)), are set forth at pp. 5-6 of the petition for certiorari. Rule 30 of the Federal Rules of Criminal Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to

which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

Count 2 of a three-count indictment filed October 12, 1953, in the United States District Court for the District of Columbia, charged that petitioner, on or about April 26, 1951, filed with the National Labor Relations Board a false affidavit attesting that he was not affiliated with the Communist Party, in violation of 18 U.S.C. 1001 and § 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159 (h)) (see Pet. 5-6). Upon motion by petitioner, filed pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, the case was transferred for trial to the Northern District of California. Following a trial by jury, petitioner was found guilty on count 2 [1] and was sentenced to imprisonment for five years and to pay a fine of $10,000 (R. 1182, 1375-1376). On appeal to the Court of Appeals for the Ninth Circuit, the judgment of conviction was affirmed.

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[1] Petitioner was acquitted on the first count, charging a false denial that he was a *member* of the Communist Party (R. 1182). The third count, which charged a false denial that petitioner *supported* an organization which taught and advocated the violent overthrow of the Government, had previously been dismissed on motion of the Government.

The evidence adduced by the Government may be summarized as follows:

Petitioner, who at the time of his indictment was National President of the Marine Cooks and Stewards Union (R. 799), had been associated with the Communist Party since at least as long ago as 1936 or 1937. At that time, as a young member of his Union, he was a militant Party member, who would confessedly, in the words of one witness, have "eliminated" his "father and mother * * * for the good of the Soviet Union" (R. 64-65). He was intent upon developing Communist control over the labor union he was later to lead (R. 63-64). During the period from 1941 to 1947, petitioner participated in numerous Communist Party meetings (R. 190, 194, 195, 198, 202-204, 207, 214, 215-216, 303-312, 393-394, 488, 496, 497). He served on the Executive Board of a Communist Party cell as early as 1941 (R. 393-394) and at various times thereafter (R. 202-204, 207). From 1945 to 1947, he participated in Party meetings on the county level (R. 214, 215-216, 497). In these county meetings, he acted as chairman (R. 198), gave "educational" talks (R. 196), participated in the expulsion of Party members (R. 205-208), and solicited new members (R. 303-312, 372-374). In 1946, he was introduced at a Party meeting as a member of the Party's (California) State and (San Francisco) County Committees (R. 493).

In June 1947, Congress passed the Taft-Hartley

(Labor Management Relations) Act (61 Stat. 136), one of the provisions of which—the provision here involved[2]—restricts the enjoyment of certain designated advantages under the National Labor Relations Act to labor unions whose officers file with the National Labor Relations Board affidavits attesting, *inter alia*, that they are not members of or affiliated with the Communist Party.

During the summer of 1947, petitioner attended a Party meeting presided over by Leonard Kaplan, Trade Union Director of the Communist Party (R. 497-506). At this meeting, Kaplan announced that the Party's policy with respect to the affidavits was that Party members would, at that time, "boycott" the Taft-Hartley Act, but that (R. 504),

> if such occasion arose where Dave Beck of the Teamsters Union and Harry Lundeberg of the Sailors' Union started chopping off their membership and tying them up in jurisdictional disputes, to save the organizations they would have to comply with the Act, and it would be understood that they would resign from the party in name only, so that they could comply, but this did not mean they would not be in touch, in close alliance with the party; they would still be informed of all major decisions and policies of the party.

Kaplan further declared that the Communist Party "had spent many years in building and training

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[2] § 101, adding § 9(h) to the National Labor Relations Act (61 Stat. 136, 146; 29 U.S.C. 159(h)).

leadership for the more progressive unions on the West Coast and they were not going to sacrifice that overnight by complying with the Taft-Hartley Act" (R. 506). Petitioner personally participated in these discussions. He stated that, while he "was being faced with a terrific struggle on the waterfront" with Lundeberg of the Sailors Union, he "saw no present need for complying with the provisions of the Taft-Hartley Act"; but that "at a later date it may prove necessary to file an affidavit" (R. 503).

In 1948, petitioner solicited witness Clarence Ward to "go to Georgia and help to get signatures for the Progressive Party." Asked by Ward whether the Progressive Party "was * * * the Communist Party," petitioner replied, "No, it isn't—the Progressive Party isn't the Communist Party, but they have * * * the best program and we want to work hand and hand with them * * *." He further promised Ward that if the latter procured the signatures and got the Progressive Party on the ballot, "then we will be able to do things for you" (R. 314).

In 1949, petitioner refused to seat Ward as a delegate to the Marine Cooks and Stewards Union convention. Petitioner told Ward: "We have been trying to do the best we can for you, but you keep fighting us." When asked what he meant by "us," petitioner said, "You [were] given the chance to come into the Communist Party and you didn't come * * *. You won't be seated in the convention * * *" (R. 318; see also R. 303-312).

In the spring of 1951, the Marine Cooks and Stewards Union, of which petitioner was then the National President, was being subjected to membership raids by, and was engaged in jurisdictional disputes with, the rival National Maritime Union (R. 932, 934, 937-939). On April 26, 1951, petitioner caused to be filed with the National Labor Relations Board the "Non-communist Affidavit" here in issue, in which he swore, *inter alia*, that he was not a member of or affiliated with the Communist Party.

In July 1951, some two and one-half months after the filing of this affidavit, witness Tiernan had occasion to state to petitioner that "[t]he American people are getting sick and tired of the Communist Party and their carryings-on in unions," to which petitioner retorted, "If you are referring to me, I am still a Communist and proud of it" (R. 697).

On another occasion in this same month, July 1951, one Stewart, a member of the Marine Cooks and Stewards Union, had occasion to ask petitioner whether he was "a member of the Communist Party," to which petitioner replied, "Yes, and I am proud of it" (R. 557). This incident was testified to by one Whitelaw (R. 648), who was also present, as well as by Stewart (R. 557).

ARGUMENT

1. Petitioner contends that the statutory term "affiliated" was unconstitutionally applied to his case in several respects (Pet. 17-28).

(*a*): It is argued (Pet. 25-28) that the Govern-

ment was required to prove that petitioner was affiliated with the Communist Party "for illegal purposes" (Pet. 25) in order to establish that he falsely swore in his non-Communist affidavit that he was not affiliated with that organization. This contention is based upon a mistaken analogy between the statute involved in *Bridges* v. *Wixon*, 326 U.S. 135, and §9(h) of the amended National Labor Relations Act, the provision at bar (Pet. 25).

The statute in *Bridges* v. *Wixon*[3] applied to aliens shown to be members of or affiliated with "any organization * * * that" advocates forcible overthrow of the Government. The Communist Party was not mentioned. Section 9(h) of the amended National Labor Relations Act, on the other hand, refers to the Communist Party by name. It denies the machinery of the Labor Board to unions whose officers have failed to file affidavits attesting that they are not members of or affiliated with "the Communist Party." The *Bridges* holding—that the act or acts tending to prove "affiliation" within the meaning of the statute there involved must be of such a quality as to indicate an adherence to or furtherance of the unlawful purposes and objectives of the organization in question (326 U.S. at 143-144)—is thus inapposite to the construction of a statute like the present one.

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[3] 8 U.S.C. (1940 ed.) 137, providing for the deportation of aliens "who are members of or affiliated with any organization * * * that * * * advocates * * * the overthrow by force or violence of the Government of the United States * * *".

Cf. *Galvan* v. *Press*, 347 U.S. 522, 529. All that is required to be proved in a prosecution under 18 U.S.C. 1001 for falsely denying affiliation with the Communist Party in a § 9(h) affidavit is that the affiant knowingly and willfully swore falsely that he was not affiliated with that organization on the date in question. *American Communications Association* v. *Douds*, 339 U.S. 382, 412-413.

Except with respect to the absence of any requirement of adhesion to the "unlawful purposes" of the Communist Party, the trial court's instructions as to the meaning of "affiliation" (see R. 1138-P) came, as petitioner concedes, "almost verbatim out of the *Wixon* opinion" (Pet. 26, fn. 31). It is to be noted that the instructions set forth in substance the precise elements which were stated by Mr. Justice Burton, with whom Mr. Justice Harlan and Mr. Justice Frankfurter joined, in his concurring opinion in *Jencks* v. *United States*, No. 23, Oct. Term, 1956, decided June 3, 1957 (slip opinion, p. 8), to be the essential constituents of the concept of "affiliation." After charging that affiliation means "a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party" (R. 1138-P), the trial court said that affiliation is shown by "'a close working alliance or association between [a person] and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for

an indefinite future period upon a fairly permanent basis" (*ibid.*).[4] In expressing the view that the affiliation instruction in *Jencks* was defective, Mr. Justice Burton said that "[i]t [the instruction] did not require a continuing course of conduct 'on a fairly permanent basis' 'that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith.'" The instruction given in the instant case thus clearly met the requirements of a satisfactory definition as set forth by Justices Burton, Harlan, and Frankfurter, in *Jencks*.

In any event, the purpose of Rule 30, F.R. Crim. P. (see *supra*, pp. 3-4) is to have counsel point out his objections to the instructions in a specific form so as to give the court the opportunity to modify or amend them in the light of well-taken objections. Here, the objections which petitioner made at the trial were quite different from those urged now in the petition (*cf.* Pet. 25-27 with R. 1148-1149). Consequently, the objections now urged are not properly presented because the trial court had no opportunity to consider them.[5]

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[4] For other parts of the court's charge on "affiliation," see Pet. App. 40-41, fn. 8.

[5] Petitioner did not express at the trial the concern for elaboration of the instruction on "affiliation" which he now expresses in his petition for certiorari (Pet. 26-27). At the trial, when the jury requested a dictionary, shortly following the submission of the case, for further enlightenment as to the meaning of "member" and "affiliation" (R. 1168,

(*b*). Equally without merit is petitioner's contention (Pet. 19-25) that his conviction is based, in substance, on nothing more than his activity in the Communist Party prior to the date of the affidavit and that the admission of this evidence had the effect of giving to the word "affiliation," as applied in this case, a "wider and different sense" than this Court gave it in the *Douds* case, *supra*, 339 U.S. 382 (Pet. 18-19).

The Government's evidence (*supra*, pp. 5-8) clearly showed petitioner's close ties with the Communist Party and adherence to its doctrines both before and after the execution of the affidavit. This evidence was admissible to show petitioner's state of

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1171), the judge, while expressing the view that a dictionary would not be helpful to the jury, indicated that he was not opposed to complying with the jury's request if "you gentlemen [*i.e.*, the attorneys for the accused and the Government] feel it would be helpful" (R. 1168). Counsel for petitioner made no request that a dictionary be supplied the jury, but on the contrary apparently acquiesced in the judge's "disposition not to send * * * the dictionary" in to them (R. 1169). The judge, accordingly, apprised the jury that, while he would gladly have supplied them with a dictionary, if he thought there was "anything in [it] that * * * would help" them in their deliberations, their proper course was to ask him for further instructions if they found, after considering his original instructions (a copy of which had previously been supplied the jury (R. 1157-58, 1165-66)), that they needed any further definition of terms (R. 1171). The jury thereupon again retired to consider a verdict, and made no further request for instructions. Counsel for petitioner at no time objected to the procedure which the judge thus adopted.

mind when he executed the affidavit and was cumulative proof of his affiliation with the Communist Party. It was proper that these relevant acts and statements—"the outward manifestations of state of mind" (*Douds*, 339 U.S. at 411-412)—should be considered by the jury in determining petitioner's guilt. The post-affidavit statements (*supra*, p. 8) indicated that petitioner still considered himself a member of the Party; these statements must be considered with his cessation of direct Party activity and the Party policy, of which he was fully aware (*supra*, pp. 6-7), of ostensible withdrawal from the Party by union officer-members who should find it tactically advisable to sign § 9(h) affidavits (in the meantime maintaining "close alliance" with the Party (R. 504)). Together, all this evidence fully warranted, we submit, the inference which the jury drew—that petitioner, contrary to his oath, was affiliated with the Communist Party at the time of his affidavit.[*]

Dealing with a contention similar to petitioner's, the Court of Appeals for the Sixth Circuit in *Hupman* v. *United States*, 219 F. 2d 243, certiorari denied, 349 U.S. 953, said (at page 248):

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[*] The jury's acquittal of petitioner on the membership count and its finding of guilt on the affiliation count presumably were based on a finding and belief that a union officer-Party member who filed a § 9(h) affidavit pursuant to such policy of the Party continued to be at least "affiliated" with the Party if not technically a member, at least where the signer of the affidavit, as here, professed himself to be, after the filing of the affidavit, "still a Communist and proud of it" (R. 697).

> The appellant's argument seems to be that unless there is direct proof that appellant was a Communist on the very day the affidavit was signed or filed, the proof of violation fails. This impresses us as an absurdity, especially when the evidence shows that the appellant's instructions were to avoid external indications of Communist membership while still maintaining connection with and giving support to the Party.

(*c*). Also lacking in substance is petitioner's contention that the word "affiliated", as used in the affidavit (Pet. 18-19) and in the indictment (Pet. 20), is too vague to warrant a conviction for false denial of affiliation. *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 412-413. The fact that "no honest, untainted interpretation" of the term is punishable under 18 U.S.C. 1001, as this Court there pointed out, "removes the possibility of constitutional infirmity" (339 U.S. at 413).

(*d*). Petitioner further urges that "[t]he alleged 1951 admissions" which he made (see *supra*, p. 8) are of "no avail to bolster this incredible case" because it was "improbable" that he would have made them and because they "lack the necessary corroboration" (Pet. 24).

So far as regards the claim (see Pet. 24, 10-11, fns. 13, 14) that it was "improbable" that petitioner made these admissions, this was, of course, an issue of credibility for the jury to determine. *Glasser* v. *United States*, 315 U.S. 60, 77. It may be noted that the trial judge, in his instructions, carefully pointed

out the possible effect of interest and hostility on the part of witnesses on their testimony (R. 1138-F, 1138-H—1138-I). With respect to petitioner's observation that witness Whitelaw failed to relate the fact of petitioner's admission in the course of prior testimony by Whitelaw at a National Labor Relations Board hearing on April 15, 1952 (Pet. 10-11, fn. 13), it should be said that the Government, on redirect examination of this witness, established that the Labor Board attorney had instructed him "to leave out the Communist issue" (R. 582) in his testimony before the Labor Board because it was irrelevant. Government Exhibit 18, dated August 6, 1951, proves conclusively that Whitelaw did relate petitioner's admission to the Federal Bureau of Investigation prior to the Labor Board hearing (R. 584-585).

With regard to the argument that petitioner's 1951 admissions "lack the necessary corroboration" (Pet. 24), petitioner's reliance upon *Opper* v. *United States*, 348 U.S. 84, and *Smith* v. *United States*, 348 U.S. 147, is clearly misplaced. In the first place, those cases deal with the question of the quantum of evidence, corroborative of an extrajudicial admission or confession *to law-enforcement authorities*, required to sustain a conviction. The requirement that there be some such corroborative evidence—and very little is required—is founded on the law's concern lest a conviction be based solely on an untrue admission or confession, induced by fear, coercion, or hope of

leniency. 3 Wigmore, *Evidence* (3d ed., 1940), §§ 821, 822; 7 Wigmore, *Evidence* (3d ed., 1940), § 2071; 2 Wharton, *Criminal Evidence* (12th ed., 1955), §§393-394, 372-383; *Bram* v. *United States*, 168 U.S. 532, 562-564; *Wilson* v. *United States*, 162 U.S. 613, 622-623; *Opper* v. *United States*, *supra*, *at* 89-90; *Smith* v. *United States*, *supra*, at 153, 155. Here, the "admissions" are of an entirely different sort, having been made prior to arrest and to private persons other than law-enforcement authorities. The rule requiring corroboration of admissions or confessions is inapplicable.

Even if it were applicable, however, there was adequate corroboration, consisting of the evidence of petitioner's active membership and leadership in the Communist Party from 1937 to 1947, the Party policy *vis-à-vis* compliance with the Taft-Hartley Act (adopted in 1947 and known to petitioner), and petitioner's activities in 1948 and 1949 indicating close alliance with the Party (*supra*, pp. 5-7). Furthermore, there were two separate and distinct admissions, made on different occasions to different witnesses, one of the admissions having been testified to by two different witnesses (*supra*, p. 8). The admissions were thus *mutually* corroborative. This fact in itself removes any real concern that the admissions may have been untrue—which, as we have seen, is the consideration on which the rule requiring some corroboration is based.

2. Petitioner contends that a portion of the testimony was inadmissible as "hearsay" (Pet. 28-32).

The challenged evidence was as follows: William Foard, a former member of the Communist Party, testified that he attended a San Francisco County meeting of the Party during the summer of 1947 and that petitioner was among those present and participating (R. 497). The meeting was for the purpose of considering the attitude of the Party toward the recently-enacted Taft-Hartley Act (R. 498). During the meeting, a discussion arose as to whether Party members who were union officials (as petitioner then was) should risk signing the "non-Communist affidavit" (R. 500). Leonard Kaplan, the Trade Union Director of the Party, who was presiding, declared that the National and State Committees of the Party had decided that Party members were to "boycott" the law, since they could "live without" it, unless other labor unions (including Harry Lundeberg's Sailors Union) menaced the "progressive" unions by membership raids or jurisdictional disputes; that, if that happened, they would have to "comply" with the Act to save their organizations; that this was to be accomplished through the device of "resign[ing]" from the Party "in name only"; and that all such officials submitting such nominal resignations were in the meantime to remain in "touch" and "close alliance with" the Party, and to be informed of all decisions and policies of the Party (R. 504-506).

In the course of this discussion, petitioner stated that he was "faced with a terrific struggle on the

waterfront" with Lundeberg's union, and that, while he saw no "present need for complying," it might prove necessary to file an affidavit at a later date (R. 503).

This evidence was clearly competent. Kaplan's statements were admissible for the purpose of making petitioner's own statements—the admissibility of which is, of course, not challenged—understandable. It is only in the context of the meeting and of Kaplan's statements that petitioner's statements have any meaning. It is well settled that surrounding circumstances, whether oral declarations or other facts, which tend to illuminate the principal fact in such a way as to make the whole one transaction and place the principal fact in its true light, are admissible on the theory of "testimonial completeness," or, as it is sometimes phrased, as part of the *res gestae*. *Beaver* v. *Taylor*, 68 U.S. 637; *Bruce* v. *United States*, 73 F. 2d 972 (C.A. 8); *Stockman* v. *United States*, 8 F. 2d 211 (C.A. 9).

3. Petitioner next contends (Pet. 33-35) that, notwithstanding that the instant prosecution was brought, as it was required to be, under the "false statements" statute (18 U.S.C. 1001), the two-witness perjury rule should nevertheless have been applied because the allegedly false statements were under oath. This is an afterthought by petitioner, since the record at the trial does not reveal any request for the two-witness perjury instruction by petitioner or any objection to the trial court's omis-

sion of such instruction. See Rule 30, F.R. Crim. P. (*supra*, pp. 3-4). Indeed, the argument is being advanced by petitioner for the first time in this Court; it was not raised in the Court of Appeals.

In any event, the Government submits that the two-witness perjury rule is inapplicable to this kind of proceeding. As petitioner points out (Pet. 33), this question was involved in *Gold* v. *United States*, 237 F. 2d 764 (C.A.D.C.), reversed on other grounds, 352 U.S. 985. For the reasons for the Government's position, the Court is respectfully referred to pp. 84-88 of our brief on the merits in that case, No. 137, Oct. Term, 1956.

4. Just before the jury rendered its verdict, the trial court ordered that, after the verdict, no person was to communicate with the jurors concerning their deliberations, without leave of the court (R. 1180-1181). On the basis of a newspaper story published several days following the return of the verdict—in which two of the jurors were alleged to have said, "A higher court [will] have to make the final determination of the meaning of 'affiliation' as the word applied to Bryson"—petitioner moved the court to be relieved of the order forbidding communication with the jury in order that he might, by questioning the jurors, ascertain whether "any extraneous or illegal considerations had entered into the jury's deliberations" (Pet. 36; R. 1192). Following argument (R. 1191-1219), the court declined to grant the requested permission (R. 1219). Petitioner's

contention (Pet. 36-38) that this was error is, we submit, without any merit.

It is well settled that "ordinarily jurors in the United States Courts will not be heard to give testimony, whether oral or by affidavit, for the purpose of impeaching the verdict returned where the facts sought to be shown are such that they essentially inhere in the verdict." *Young* v. *United States*, 163 F. 2d 187, 188 (C.A. 10), certiorari denied, 332 U.S. 770.[7] This Court indicated its accord with this policy in *Stein* v. *New York*, 346 U.S. 156, 178-179:

> Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases. *McDonald* v. *Pless*, 238 U.S. 264. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue. *Hyde* v. *United States*, 225 U.S. 347. "If evidence thus secured could be thus used, the result would be to make what

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[7] See also *Clark* v. *United States*, 289 U.S. 1, 18; *United States* v. *Furlong*, 191 F. 2d 1, 4-5 (C.A. 7), certiorari denied, 343 U.S. 950; *United States* v. *Hohn*, 198 F. 2d 931, 938-939 (C.A. 3), certiorari denied, 344 U.S. 913; *Rakes* v. *United States*, 169 F. 2d 739, 745-746 (C.A. 4), certiorari denied, 335 U.S. 826; *United States* v. *Handy*, 203 F. 2d 407, 419 (C.A. 3), certiorari denied *sub nom. Maroney* v. *United States*, 346 U.S. 865; *Northern Pacific Railway* v. *Mely*, 219 F. 2d 199, 201-202 (C.A. 9); and the numerous authorities cited in *Young*, *supra*.

was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, *supra*, at 267-268.

But this inability of a reviewing court to see what the jury has really done is inherent in jury trial of any two or more issues, and departure from instruction is a risk inseparable from jury secrecy and independence. The uncertainty, while the cause of concern and dissatisfaction in the literature of the profession, does not render the customary jury practice unconstitutional.[8]

At the same time that it made the order from which petitioner sought to be relieved, the court admonished the jury that, if at any time any of them felt that something should be said about the jury's deliberations or any incidents connected therewith, they should feel free to communicate with the court and the court would hear them (R. 1181). The order itself enjoined the parties from communicating with the jury "without permission of the Court". (*ibid.*). In denying petitioner permission to communicate with the jury, the trial court said, " * * * if there were any reliable hint, any showing of substance beyond just a mere idle curiosity to justify interview of the jury to ascertain whether they func-

[8] Questioning jurors about their deliberations to impeach their verdict has been frequently criticized. See American Bar Association Canon of Professional Ethics, No. 23; American Bar Association Committee on Professional Ethics, opinion 109, issued March 10, 1934 (R. 1197).

tioned as a jury should function, the Court would certainly entertain it. There is no showing here of any reason to interview the jury at this late day. * * *" (R. 1218).

We submit, furthermore, that the statements attributed to two of the jurors by the newspaper article fail to show that they were uncertain as to the meaning of "affiliation." These were at most equivocal statements which could have indicated a desire on the part of these two jurors to have an appellate court determine whether or not they were correct in their determination. In any event, "[j]urors cannot be heard to testify that while the substance of the verdict returned into court was understood, it was predicated upon a mistake of the testimony, a misrepresentation of the law, unsound reasons, or improper motives." *Young* v. *United States*, *supra*, 163 F. 2d at 189 (C.A. 10), certiorari denied, 332 U.S. 770. The jury was individually polled and each juror agreed that the verdict returned was his (R. 1182-1183), and no juror, at any time, notwithstanding the court's explicit invitation to the jurors to do so if they desired, evidenced a wish to report to the court anything in the nature of an irregularity or otherwise in connection with the jury's deliberations. In these circumstances, the court properly refused, in the exercise of a sound discretion, to permit petitioner or others on his behalf to interrogate individual jurors as to what went on in the privacy of the jury room, or as to how the jurors arrived at the verdict

they reached, or otherwise to subject them to questioning.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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